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APPENDIX A

The U.S. Constitution

Amendment V—Trial and Punishment, Compensation for Takings.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person *be subject for the same offense to be twice put in jeopardy of life or limb*; nor shall be compelled in any criminal case to be a witness against himself, nor be *deprived* of life, liberty, or property, without *due process* of law; nor shall private property be taken for public use, without just compensation.

APPENDIX B

The U.S. Constitution

Amendment VI—Right to speedy trial, confrontation of witnesses.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX C

The U.S. Constitution

Amendment VIII—Cruel and Unusual punishment.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

APPENDIX D

The U.S. Constitution

Amendment XIV—Citizenship rights.

1. All persons born or naturalized in the United States, and subject to the *jurisdiction* thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State *deprive* any person of life, liberty, or property, without *due process* of law; nor deny to any person within its *jurisdiction* the equal protection of the laws.

2. Representatives shall be *apportioned* among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or

hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX E

28 U.S.C. § 1257 states in relevant part:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

APPENDIX F

Section 775.082 of the Florida Statutes states in relevant part:

(1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

APPENDIX G

Section 921.141 of the Florida Statutes states in relevant part:

(2) Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make

the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

APPENDIX H

SUPREME COURT OF FLORIDA
WEDNESDAY, DECEMBER 10, 2003

NO. SC03-1144

TED HERRING,

Petitioner(s)

vs.

JAMES V. CROSBY, JR., ETC., ET AL.,

Respondent(s)

The petition for writ of habeas corpus is hereby denied.

WELLS, PARIENTE, LEWIS, QUINCE, CANTERO and BELL, JJ., concur.

ANSTEAD, C.J., would deny without prejudice to file in the trial court.

A True Copy
Test:

/s/ THOMAS D. HALL
Thomas D. Hall
Clerk, Supreme Court

[Round Stamp]
SUPREME COURT OF THE
STATE OF FLORIDA

APPENDIX I

IN THE CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO. 81-1957-CC

Filed in open Court March 1, 1982

STATE OF FLORIDA,

—VS.—

TED HERRING,

Defendant.

FINDINGS PURSUANT TO F. S. 921.141

I. On February 25, 1982 at Daytona Beach, Florida, the jury returned a verdict of guilty as to Murder in the First Degree and Robbery With a Firearm. On February 26, 1982 the jury returned an advisory opinion recommending imposition of the death penalty. The Defendant was sentenced to death by electrocution by this Court on March 1, 1982, and their findings are filed concurrent with sentencing. While these findings concern the application of the death penalty the Court does note with regard to the robbery sentence that there was abundant evidence to support

a finding of premeditated murder. It is not a situation where there was only evidence to support felony murder (see *Mahaun vs. State*, 377 So. 2nd 1158 (Fla. 1979) and *Hillery vs. State*, 391 So. 2nd 777 (4th DCA 1980).

II. *Aggravating circumstances* (must be established beyond a reasonable doubt)

1. *The crime for which the defendant is to be sentenced was committed while he was under sentence of imprisonment.* The evidence does not establish this circumstance.

2. *The Defendant has been previously convicted of another capital offense or of a felony involving the use of threat of violence to some person.* As conceded by the defense the Defendant was convicted and sentenced by this Court in January of 1982 for an unrelated robbery with a firearm. This factor is established.

3. *The Defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons.* There is no evidence to support this circumstance.

4. *The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery.* As conceded by the defense the murder was committed by the Defendant during the course of a robbery. This circumstance is established.

5. *The crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.* The Court accepts Detective Varner's testimony wherein the Defendant said he fired the second shot into Norman Dale Hoeltzel because he was still alive and the Defendant did

not want a witness to his crime. By his own admission the Defendant clearly established this circumstance. The case of *Riley vs. State*, 366 So. 2nd 19 (Fla. 1979) supports the proposition that this circumstance applies to the elimination of witnesses to a crime as well as law enforcement officers.

6. *The crime for which the Defendant is to be sentenced was committed for financial gain.* While the facts of the case fit this circumstance it cannot be counted because this Court already has counted as an aggravating circumstance the fact that the crime was committed during the felony of robbery.

7. *The crime for which the Defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.* The evidence does not establish this circumstance.

8. *The crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel.* This circumstance comes close to being established. The Defendant gave no indication of any remorse during the trial. In fact, probation officer Mary White testified Defendant stated the death of Norman Dale Hoeltzel meant "one less cracker." Lack of remorse can be considered in determining this criteria (*Sireci vs. State*, 399 So. 2nd 964 (Fla. 1981). Still this Court believes however brutal and senseless this crime is, it does not meet this extreme criteria.

9. *The crime for which this Defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.* Norman Dale Hoeltzel was shot in the side of the head at close range. The bullet first passed through his

hand. While he lay on the floor wounded, but still alive, the Defendant shot him again in he neck to eliminate any possible witness. The victim was killed because he may have been a possible witness to the robbery. There is no evidence Norman Dale Hoeltzel and the Defendant knew one another or had any contact prior to the shooting. There is only some slight evidence Norman Dale Hoeltzel was making a move towards the armed Defendant. There certainly was no affray. This Court finds beyond a reasonable doubt that this murder was cold, calculated, and premeditated; and without any pretense of moral or legal justification. This circumstance is established.

III. Mitigating circumstances (do not have to be established beyond a reasonable doubt)

1. *Defendant has no prior significant history of prior criminal activity.* Pursuant to *Maggard vs. State*, 399 So. 2nd 973 (Fla. 1981) the defense conceded this mitigating circumstance did not exist; and the court prohibited the State from playing the full confession tape which would have disclosed the Defendant's participation in several convenience store robberies. This mitigating circumstance does not exist (with the exception of the one convenience story [sic] robbery for which the Defendant was previously tried and convicted, this Court did not take into consideration the three convenience store robberies now pending before this Court.)

2. *The crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.* The evidence does not establish this circumstance.

3. *The victim was a participant in the Defendant's conduct or consented to the act.* The evidence does not establish this circumstance.

4. *The Defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the Defendant's participation was relatively minor.* The evidence does not establish this circumstance.

5. *The Defendant acted under extreme duress or under the substantial domination of another person.* The evidence does not establish this circumstance.

6. *The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.* There was no evidence indicating Defendant was intoxicated or was operating with reduced capacity to appreciate the criminality of his conduct on May 29, 1981. In fact, the evidence strongly indicates the murder was coldly calculated to eliminate a witness. The Defendant's mother did indicate the Defendant had learning disability, was hyperactive, and had a low IQ of 80. But this Court had ample opportunity to closely observe the Defendant. He is alert, responsive, and reasonably articulate. At worst, he is of slightly below average intelligence. This mitigating factor is not established by the evidence.

7. *The age of the Defendant at the time of the crime.* The State and the defense indicate the Defendant was 19 at the age [sic] of the crime. Although the Florida Supreme Court has said there is no per se rule pinpointing a particular age as an automatic mitigation factor (*Perry vs. State*, 395 So. 2nd 170 (Fla. 1981), nineteen seems to be right at the pivot

point. The Defendant in *Perry* was 20, and yet that age was not counted as a mitigating circumstance under the facts of that case. In this case age does not seem to be a factor. After observing the Defendant closely over a period of time the Court believes the Defendant would continue the same course of criminal conduct at age 20, and beyond. Nonetheless, the Court feels the Defendant should be given the benefit of the doubt as to this mitigating factor. This mitigating factor is established but it is not a strong mitigating factor.

8. *Any other aspect of the Defendant's character of record and any other circumstance of the of the offense.* The Court accepts as a mitigating circumstance the fact that as Defendant had a difficult childhood (see *Neary vs. State*, 384 So.2nd 881 (Fla. 1980). His mother indicated the Defendant was raised essentially without a father, was hyperactive, had learning disabilities, and had trouble in school.

SUMMARY

The Court finds that four (4) aggravating circumstances exist; only two (2) mitigating factors have been established. This Court is aware however that the Court should go beyond mere mechanical tabulation (*Brown vs. State*, 381 So.2nd 690 (Fla. 1980). In this case, not only do the established aggravating factors numerically outweight [sic] the mitigating factors, but the aggravating factors are stronger and carry more weight and relevancy than the mitigating factors. The Defendant's age and difficult childhood are not sufficient mitigating factors to block imposition of the death penalty in a case where a Defen-

dant, now with a prior violent felony conviction, murders an innocent clerk during a robbery so that the clerk will not testify against him. Further, this Court must also give due weight to the jury's recommendation of death. After having carefully reviewed all evidence in this case and carefully reviewing the evidence in mitigation and aggravation, the Court finds imposition of the death penalty is warranted.

/s/ S. JAMES FOXMAN
S. JAMES FOXMAN CIRCUIT JUDGE
March 1, 1982

COPIES TO: Gayle Graziano, Assistant State Attorney
J. Peyton Quarles, Assistant Public Defender

APPENDIX J

IN THE CIRCUIT COURT OF
THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA,
IN THE YEAR OF OUR LORD
ONE THOUSAND NINE HUNDRED AND EIGHTY-ONE

Florida Statute No. 782.04 & 812.13
Filed in open Court June 20, 1981

STATE OF FLORIDA,

—VS.—

TED HERRING

INDICTMENT

THE SPRING TERM GRAND JURY in and for Volusia County, Florida, empaneled and sworn to inquire and true presentment make, hereby, in the name of and by the authority of the State of Florida, bring this prosecution and make the following charge or charges in two (2) count(s):

COUNT I

CHARGE: FIRST DEGREE MURDER, in Violation of F.S. 782.04

SPECIFICATIONS OF CHARGE: In that TED HERRING, on or about the 29th day of May, 1981, at or near Daytona Beach within Volusia County, Florida, then and there unlawfully, while engaged in the perpetration of or attempt to perpetrate a robbery, or from a premeditated design to effect the death of one Norman Dale Hoeltzel, a human being, did kill and murder Norman Dale Hoeltzel by shooting him with a gun.

COUNT II

CHARGE: ROBBERY, in Violation of F.S. 812.13(1) & (2)(a)

SPECIFICATIONS OF CHARGE: In that TED HERRING, on or about the 29th day of May, 1981, at or near Daytona Beach within Volusia County, Florida, did unlawfully by force, violence, assault or putting in fear, take certain property, to-wit: U.S. currency, of a value more than One ($1.00) Dollar, the property of the Southland Corporation or Norman Dale Hoeltzel as owner or custodian, from the person or custody of Norman Dale Hoeltzel, and in the course of committing said robbery, carried a firearm, to-wit: a revolver.

A TRUE BILL

/s/ [Illegible]
Foreman of the Grand Jury

I, the undersigned State Attorney or Assistant State Attorney, as authorized and required by law, have advised the Grand Jury returning this indictment.

/s/ [Illegible]
Assistant State Attorney
Seventh Judicial Circuit of Florida

This indictment presented by the aforesaid Grand Jury in open court this 20th day of June, 1981, and on the 30th day of June, 1981, at the hour of 6:30PM was filed by me.

/s/ [Illegible]
Deputy Clerk of the Circuit Court

APPENDIX K

IN THE CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR VOLUSIA COUNTY

CASE NO. 81-1957, DIVISION CC

Filed August 2, 1982

STATE OF FLORIDA,

—VS.—

TED HERRING,

Defendant.

Volusia County Courthouse
DeLand, Florida
February 26, 1982
8:30 A.M.

TRANSCRIPT OF PROCEEDINGS

The above-styled cause came on to be heard before the Honorable S. James Foxman, Circuit Judge, and a duly impaneled jury at the time and place above indicated.

PRESENT: GAYLE GRAZIANO, Esquire
Assistant State Attorney
on behalf of the State of Florida

PEYTON QUARRLES, Esquire
Assistant Public Defender
for defendant

HOWARD B. PEARL, Esquire
Assistant Public Defender
for Defendant

TRACY L. ROMANO
Deputy Official Court Reporter
Seventh Judicial Circuit of Florida

Others as may appear in the transcript.

WHEREUPON the following proceedings were had:

* * *

[60] it's just so bad, the electric chair is what is called for. Is this that kind of a case? Certainly not.

Ted's mother indicated that he had problems one time and he was sent to St. Luke's Hospital to be evaluated for psychological problems and learning disabilities. While he was there, Ted was checked by a lot of people and tested by a lot of people. And, as far as learning was concerned, he was asked to write something. And this is one of the things he wrote. This is, as you will be able to hear, this is not grammatically perfect language.

MS. GRAZIANO: Your Honor, I'm going to object. This is not in evidence.

THE COURT: Objection is sustained.

MR. QUARRLES: Ted Herring is a human being. Dale Hoeltzel was a human being. Killing Ted Herring isn't going to bring Mr. Hoeltzel back. It's not going to do anybody any good. Don't vote for Ted Herring's life.

THE COURT: Thank you, counsel.

Ladies and gentlemen of the jury:

It's now your duty to advise the Court as to what punishment should be imposed upon the Defendant for this crime of first degree murder.

As you've been told, the final decision as to what punishment shall be imposed, is the responsibility of **[61]** the Judge. However, it's your duty to follow the law that will now be given you be [sic] the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstance exist to justify the imposition of the death penalty. And whether sufficient mitigating circumstance exist, outweigh the aggravating circumstance found to exist.

Your advisory sentence should be based upon the evidence that you've heard while trying the guilt or innocence of the Defendant and evidence that has been presented to you in these proceedings.

The aggravating circumstance that you may consider are limited to any of the following that are established by the evidence.

The crime for which the Defendant is to be sentenced was committed while he was under the sentence of imprisonment.

The Defendant has been previously convicted of another capital offense or of a felony involving the use of threat or violence to some person.

The crime of robbery with a firearm is a felony involving the use of violence to another person.

The Defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons.

[62]The crime for which the Defendant is to be sentenced, was committed while he was engaged in the commission of the crime of robbery.

The crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing the lawful arrest or effecting excape from custody.

The crime for which the Defendant is to be sentenced was committed for financial gain.

The crime for which the Defendant is to be sentenced was committed to disrupt or hinder the lawful execution of any governmental function or enforcement of laws.

You're instructed that if you find beyond a reasonable doubt that the capital crime was committed for pecuniary gain. [sic] And also, beyond a reasonable doubt that the capital crime was committed while the Defendant was engaged in the commission of a robbery, the law in the State of Florida is such that you may consider these as only one aggravating circumstance.

The crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious, or cruel.

The crime for which the Defendant is to be sentenced was committed in a cold, calculated, premeditated manner, without any pretense of moral or legal justifi-**[63]**cation.

If you find the aggravating circumstance do not justify the death penalty, your advisory sentence should be one of life imprisonment without the possibility of parole for twenty-five years.

Should you find sufficient aggravating circumstance do exist, it will then be your duty to determine whether the mitigating circumstance exist, that outweigh the aggravating circumstance.

Among the mitigating circumstance you may consider if established by the evidence, are:

The crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

The victim was a participant in the Defendant's conduct or consented to the act.

The Defendant was an accomplice in the offense for which he is to be sentenced. But, the offense was committed by another person and the Defendant's participation was relatively minor.

The Defendant acted under extreme duress or under the substantial domination of another person.

The capacity of the Defendant to appreciate the criminality of the conduct or conform his conduct to the requirements of law, was substantially impaired.

[64]The age of the Defendant at the time of the crime.

Any other aspect of the Defendant's character or record in any other circumstance of the offense.

Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.

If one or more aggravating circumstance are established, you should consider all the evidence tending to establish one or more mitigating circumstance.

And give the evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

Mitigating circumstance need not be proved beyond a reasonable doubt by the Defendant. If you're reasonably convinced that mitigating circumstance exist, you may consider it as evidence.

The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circum-

stance against the mitigating circumstance, and your advisory sentence must be based on these considerations.

In these proceedings, it's not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury.

[65] The fact that the determination of whether the majority of you recommend the sentence of death or the sentence of life imprisonment in this case, can be reached by you by a single ballot. It should not influence you to act hastily or without due regard to the gravity of these proceedings.

Before you ballot, you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake. Bring to bear your best judgement in reaching your advisory sentence.

If a majority of the jury determine that the Defendant should be sentenced to death, your advisory sentence will be:

The majority of the jury by vote . . . whatever the vote is.

Advise and recommend to the Court that it impose the death penalty upon the Defendant.

On the other hand, if by six or more votes, the jury determines that the Defendant should not be sentenced to death, your advisory sentence will be:

The jury advises and recommends to the Court that it impose the sentence of life imprisonment upon the Defendant without the possibility of parole for twenty-five years.

You'll now retire to consider your recommendation. **[66]** When seven or more of you are in agreement as to what the sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to the Court.

I'll send back both recommendations. Return the appropriate recommendation.

Counsel, any corrections or additions to the instructions as read?

MS. GRAZIANO: No, Your Honor.

MR. QUARRLES: Yes, sir.

THE COURT: Yes, sir.

Should they be made outside the jury?

MR. QUARRLES: Yes.

THE COURT: We need to have you go out for a second, please.

THE BAILIFF: The jury is out of hearing.

THE COURT: Thank you.

Mr. Quarrles.

MR. QUARRLES: I apologize, Your Honor. But, this morning we discussed that I indicated I would object to Aggravated Circumstance number 9. And we didn't cover that when we reconvened downstairs just before coming up. And I wanted to renew that or object to that particular instruction.

THE COURT: All right. For the record, what's **[67]** happened is that number 9, the aggravated circumstance which is the crime for which the Defendant is to be sentenced, was committed in cold, calculated, premeditated manner without any pretense of moral or legal justification. Counsel is objecting to that being read to the jury.

I guess you have Constitutional problems with it?

MR. QUARRLES: Yes, sir.

THE COURT: In essence, that's your objection? All right. That objection is noted for the record.

Bring the jury back in.

Counsel, take a look at the pencils and paper, if you would like.

MS. GRAZIANO: No.

MR. QUARRLES: No.

THE COURT: Okay. Ben, put the one item admitted into evidence, over there, as well.

Ben, also, these two items.

THE BAILIFF: The jury is seated, Your Honor.

THE COURT: Thank you.

Ladies and gentlemen of the jury:

I'll have the bailiff hand Mrs. Flannagan at this time, the following items.

Pencils and paper to help you with your deliberations, if you need it. Two possible verdict forms. **[68]** The one piece of evidence that was admitted during these proceedings. And the instructions in writing that I just read to you.

You may now retire to reach your verdict or an advisory opinion to the Court. Just as soon as you have, knock on the door and we'll bring you out here and we will receive your advisory opinion.

You may now go back and have full and free discussion of this matter.

THE BAILIFF: The jury is out of hearing.

[Recess.]

THE COURT: Let's bring back the jury.

THE BAILIFF: The jury is seated, Your Honor.

THE COURT: Miss Flannagan, have you reached an advisory opinion?

JUROR #3: Yes, we have.

THE COURT: Would you please hand it to the bailiff who will hand it to me.

All right. Mr. Herring, please stand. Counsel.

Publish the verdict.

THE CLERK: Advisory opinion. Circuit Court, Seventh Judicial Circuit, in and for Volusia County, Florida. Case No. 81-1957-CC.

State of Florida versus Ted Herring, Defendant.

The majority of the jury by a vote of eight, advise **[69]** and recommend to the Court that it impose the death penalty upon Ted Herring.

So say the majority of us, dated this 26th day of February, 1982, at Daytona Beach, Volusia County, Florida. Lorraine Flannagan, Foreperson.

THE COURT: Is there anything else to come before the Court, at this time?

MS. GRAZIANO: Nothing from the State, Your Honor.

THE COURT: Defense.

MR. QUARRLES: No, sir.

THE COURT: I'm going to postpone the sentencing in this case until twelve o'clock Monday, to consider the recommendation of the jury. I'll impose sentence at twelve o'clock in this courthouse Monday.

Mr. Quarrles, I intend to discharge the jury now. They do not have to be present when the sentence is imposed.

Do you object to that procedure?

MR. QUARRLES: I would like the jury polled, as far as the majority.

THE COURT: You have the right to have the jury polled. As to that procedure, do you have any objections?

MR. QUARRLES: I don't understand.

THE COURT: I'm not going to have the jury present **[70]** unless they want to be. I'm discharging the jury now and sentence the Defendant without the jury being present on Monday.

MR. QUARRLES: No. I have no objection to that.

THE COURT: State.

MS. GRAZIANO: No objection.

THE COURT: Mr. Clerk, come over here, please.

THE CLERK: Do you, Miss Vve Carter, agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read by the clerk?

JUROR #1: Yes.

THE CLERK: Do you, Miss Thelma Crawford, agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read by the clerk?

JUROR #2: Yes, I do.

THE CLERK: Do you, Miss Lorraine Flannagan, agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read by the clerk?

JUROR #3: Yes.

THE CLERK: Do you, Mr. Nelson Burnham, agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read by the [71] clerk?

JUROR #4: Yes.

THE CLERK: Do you, Miss Helen Wickham, agree and confirm that a majority of the jury joined in the advisory sentence you have just heard read by the clerk?

JUROR #5: Yes.

THE CLERK: Do you, Alice Reede, agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read by the clerk?

JUROR #6: Yes.

THE CLERK: Do you, Miss Rilla Painter, agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read by the clerk?

JUROR #7: Yes.

THE CLERK: Do you, Miss Elvira Newcombe, agree and confirm that a majority of the jury joined in the advisory sentence you have just heard read by the clerk?

JUROR #8: Yes.

THE CLERK: Do you, Mr. Robert Russ, agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read by the clerk?

JUROR #9: Yes.

THE CLERK: Do you, Miss Felicia Wroniak, agree [72] and confirm that a majority of the jury joined in the advisory sentence that you have just heard read by the clerk?

JUROR #10: Yes.

THE CLERK: Do you, Miss May Johnson, agree and confirm that a majority of the jury joined in the advisory sentence you have just heard read by the clerk?

JUROR #11: Yes.

THE CLERK: Do you, Miss Helen Conrad, agree and confirm that a majority of the jury joined in the advisory sentence that you have just heard read by the clerk?

JUROR #12: Yes.

THE CLERK: All affirmative, Your Honor.

THE COURT: Thank you.

Ladies and gentlemen of the jury:

I wish to thank you for your time and consideration of the case. I also wish to advise you of some very special privileges enjoyed by jurors. No juror can ever be required to talk about the discussions that occurred in the jury room, except by Court Order.

For many centuries, our society has relied upon juries [sic] considerations of difficult cases. We've recognized for hundreds of years that a jury's deliberations, discussions and votes, should remain their private affair [73] as long as they wish it.

Therefore, the law gives you the unique privilege not to speak about the jury's work. Although, you're at liberty to

speak with anyone about your deliberations, you're also at liberty to refuse to speak to anyone.

The request may come from those who are simply curious or those who might seek to find fault with you. It will be up to you to decide whether to preserve your privacy as a juror.

I would like the rest of the court to stay where they are. Mr. Vayo, escort the jury out that door. You may leave. Thank you, again.

[Jury excused]

THE COURT: Is there anything else to come before the Court, at this time?

MS GRAZIANO: Nothing from the State, Your Honor.

MR. QUARRLES: I have some matters that I brought to the Court's attention earlier. The proffer.

THE COURT: Okay. We'll go down in chambers with the court reporter.

Do you wish the Defendant to be present at the proffer?

MR. QUARRLES: No, sir.

THE COURT: All right. You waive his presence at the proffer?

* * *

APPENDIX L

580 So.2d 135

SUPREME COURT OF FLORIDA

Ted HERRING,

Appellant,

—v.—

STATE of Florida,

Appellee.

No. 75209.
May 2, 1991.
Rehearings Denied June 12, 1991.

Motion was filed for postconviction relief. The Circuit Court, Volusia County, S. James Foxman, J., denied motion. Movant appealed. The Supreme Court held that: (1) Supreme Court decision in *Rogers* restricting applicability of cold, calculated, and premeditated aggravating factor in death penalty cases did not entitle movant to new sentencing hearing, and (2) due process principles required evidentiary hearing on movant's claim that his public defender's service as special deputy in adjacent jurisdiction resulted in ineffective assistance of counsel.

Remanded.

Barkett and Kogan, JJ., dissented as to Part I.

McDonald, J., dissented as to Part II and filed a concurring and dissenting opinion.

Barkett, J., filed a concurring and dissenting opinion in which Kogan, J., concurred.

[*136] Jon. M. Wilson of Foley & Lardner, Van Den Berg, Gay, Burke, Wilson & Arkin, Orlando, and Jeremy G. Epstein, Dennis P. Orr, David Sorokoff and Alan S. Goudiss of Shearman & Sterling, New York City, for appellant.

Robert A. Butterworth, Atty. Gen. and Barbara C. Davis, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

Ted Herring appeals the trial court's denial of his motion for postconviction relief under rule 3.850, Florida Rules of Criminal Procedure. The motion sets forth two claims: (1) that our decision in *Rogers v. State*, 511 So.2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), receding from the application of the cold, calculated, and premeditated aggravating factor, as we applied it in Herring's direct appeal,[1] requires a vacation of Herring's death sentence; and (2) that Herring's trial counsel's appointment as a special deputy sheriff resulted in ineffective assistance of counsel in Herring's trial proceeding.[2] For the reasons expressed, we affirm the

[1] *Herring v. State*, 446 So.2d 1049 (Fla.), *cert. denied*, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

[2] We have jurisdiction. Art. V, § 3(b)(1) Fla.Const.

denial of relief on the first claim and remand to the trial court for an evidentiary hearing on the second claim.

This case has an extensive history before this Court. In 1981, Herring was charged with the murder of a convenience store clerk. We affirmed Herring's conviction for first-degree murder and his sentence of death in *Herring v. State*, 446 So.2d 1049 (Fla. 1984) [*Herring I*]. The facts are detailed in that opinion. In affirming that sentence, we held that the trial judge properly found four aggravating circumstances: (1) that Herring had previously been convicted of another armed robbery; (2) that the murder was committed while engaged in the commission of a robbery; (3) that the murder was committed for the purpose of avoiding lawful arrest; and (4) that the [***137**] murder was committed in a cold, calculated, and premeditated manner. In doing so, we expressly discussed the application of this last aggravating factor in that opinion. We also agreed with the trial judge that the following mitigating factors were present: (1) that Herring was nineteen years old at the time of the crime; (2) that he had a low intelligence quotient and learning disabilities; and (3) that he had had a difficult childhood.

In 1985, Herring filed a motion to vacate judgment and sentence under rule 3.850. The trial court denied the motion and we affirmed. *Herring v. State*, 501 So.2d 1279 (Fla. 1986) [*Herring II*]. Subsequently, in 1987, Herring filed a petition for writ of habeas corpus, claiming that his appellate counsel rendered ineffective assistance. This Court denied relief in *Herring v. Dugger*, 528 So.2d 1176 (Fla. 1988) [*Herring III*].

In 1988, Herring filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. In his petition, Herring asserted that this

Court's decision in *Rogers* required vacation of Herring's death sentence. Herring claimed that, since *Rogers* expressly overrules the application of the cold, calculated, and premeditated aggravating circumstance in our decision in *Herring I*, he is entitled to a new sentencing hearing. The state moved to dismiss Herring's petition because this issue had not been heard by a state court. Herring consented to the state's motion and filed the present motion under rule 3.850, asserting that our decision in *Rogers* was a change in the law. The trial court denied the motion on this ground, holding:

> [T]his matter is procedurally defaulted in that it is untimely presented in violation of the filing deadline set forth in Florida Rule of Criminal Procedure 3.850 and constitutes an abuse of the writ. As noted by the Florida Supreme Court in *Eutzy v. State*, [541 So.2d 1143 (Fla. 1989)], its decision in *Rogers v. State*, 511 So.2d 526, 533 (Fla. 1987), restricting the applicability of the cold, calculated, and premeditated aggravating factor was *not* a fundamental change in the law which "should be given retroactive effect" but was a mere "evolutionary refinement" in the law which should not be utilized to abridge the finality of judgments.

After so holding, the trial court allowed Herring to amend his 3.850 motion to assert an additional claim regarding his trial counsel's undisclosed conflict of interest. In that claim, Herring asserted that Howard Pearl, an assistant public defender of Volusia County and chief of the capital division, who had been appointed as his trial counsel, was also serving as a special deputy sheriff in Marion County while he represented Herring. Herring contends that,

although Pearl had held this position for more than fifteen years, he had never disclosed this fact to Herring. Herring claims that Pearl's undisclosed conflict of interest presumptively denied him effective assistance of counsel and entitles him to a new trial. In considering this part of the motion, the trial court denied relief without an evidentiary hearing, stating:

> 1. The Defendant's motion relies entirely upon the same factual assertions and legal argument presented to and rejected by this court after evidentiary hearing in *State of Florida vs. Roy Allen Harich*, Case Number 81-1894-BB; in fact, the Harich case as well as the appendices submitted in support of the Harich motion are incorporated by reference in this Defendant's motion. . . . [T]he Defendant's motion merely restates the factual allegations of Harich's motion (most of which have already been rejected by this court in its order denying relief in Harich's case) and no new factual allegations or legal argument are presented in support of the special deputy sheriff/actual conflict of interest issue first raised by Harich and now regurgitated by every capital defendant who was represented by Assistant Public Defender Howard Pearl. Accordingly, for the same reasons outlined in this court's order denying relief in Harich and for the reasons outlined in the State's Rule 3.850 response, the instant motion is denied. . . .
>
> [***138**] 2. The various substantive allegations of conflict of interest raised in the Harich petition and now duplicated by the defendant were rejected in Harich. This court's factual and legal conclusions in Harich necessarily control in this case especially given the

lack of any additional factual allegations in support of his claim by the defendant. The issues presented having already been fully and fairly litigated in the Harich proceeding, and this court having already determined as a matter of fact and law that Howard Pearl was not a regular deputy sheriff but was in fact a "special" or "honorary" deputy sheriff in Marion County for the *sole* purpose of permitting him to carry a firearm and that that status did not create a conflict of interest in his position as an assistant public defender in Volusia County, the instant motion is summarily denied.

PART I

Invalid Aggravating Factor

[1] With regard to Herring's first claim, we find that our *Rogers* decision does not mandate relief under the circumstances of this case. There were four aggravating factors found applicable to this murder: (1) prior conviction of another armed robbery; (2) that the murder was committed while engaged in the commission of a robbery; (3) that the murder was committed for the purpose of avoiding lawful arrest; and (4) the aggravating circumstance in issue, that this murder was committed in a cold, calculated, and premeditated manner. As noted by this Court in *Eutzy v. State*, 541 So.2d 1143, 1147 (Fla. 1989), our decision in *Rogers*, restricting the applicability of the cold, calculated, and premeditated aggravating factor, was not a fundamental change in the law that should be given retroactive effect but was "a mere evolutionary refinement in the law," which should not be utilized to abridge the finality of our judgments. Although we have held in *Eutzy* that *Rogers* is not retroac-

tive, we have chosen to address this issue on the merits because we expressly receded from our approval of the cold, calculated, and premeditated aggravating factor in *Herring I* in our *Rogers* decision.

While the cold, calculated, and premeditated aggravating factor no longer applies to the circumstances in *Herring*, we find that this is not a change that requires a new sentencing hearing in this case. None of the facts and circumstances that were before the jury regarding how Herring committed the murder are changed. If the aggravating circumstance of a "conviction of a prior crime of violence" had been eliminated, that would have changed the facts and circumstances before the jury.

The evidence before the jury established that Herring shot the clerk once in the head and again after the clerk fell to the floor and that the second shot was to prevent the clerk from being a witness against him. *Herring I* at 1057. Given the other aggravating and mitigating factors that went into the weighing process in the sentencing phase of this case, we find that the result of the weighing process would not have been different had this aggravating circumstance not been articulated as a factor in the sentencing. We find that the elimination of this factor, under the circumstances of this case, does not compromise the weighing process of either the judge or jury. *See Hill v. State*, 515 So.2d 176 (Fla. 1987), *cert. denied*, 485 U.S. 993, 108 S.Ct. 1302, 99 L.Ed.2d 512 (1988).

PART II

Ineffective Assistance of Counsel

[2] With regard to Herring's public defender's service as a special deputy, we hold that due process principles require an evidentiary hearing. In *Harich v. State*, 542 So.2d 980 (Fla. 1989), we found that this same public defender's service as a special deputy was sufficient to require an evidentiary hearing on the issue of whether his relationship to law enforcement officials affected his ability to provide effective legal assistance. After the evidentiary hearing in *Harich*, the trial judge made detailed findings of fact and denied relief. We affirmed the trial judge, holding that the fact that this public defender was a special deputy [***139**] in an adjacent jurisdiction, particularly given the circumstances of the duties and status of such deputy sheriff, did not result in a *per se* conflict of interest. *Harich v. State*, 573 So.2d 303 (Fla. 1990).

The trial judge in this case concluded that it was not necessary to duplicate the evidentiary hearing regarding this issue because he had previously made factual findings on this identical issue in *Harich*. We find that due process principles do not allow the trial judge to adopt factual findings made in a prior case involving a different defendant, even though it concerns the same issue. Herring must be afforded an opportunity to present evidence and examine and cross-examine witnesses on this issue. Although we recognize that the evidence presented may be duplicative, due process requires that Herring be afforded an opportunity for a hearing on this matter. If other defendants raise this same claim, however, we find that it would be proper

for the chief judge to consolidate the cases for one hearing on this single issue.

Accordingly, we remand this cause to the trial judge to have an evidentiary hearing to determine whether Herring's public defender's service as a special deputy sheriff affected his ability to provide effective legal assistance. We deny relief on all other grounds.

It is so ordered.

SHAW, C.J., and OVERTON, GRIMES and MCDONALD, JJ., concur as to Part I.

BARKETT and KOGAN, JJ., dissent as to Part I.

SHAW, C.J., and OVERTON, BARKETT, GRIMES and KOGAN, JJ., concur as to Part II.

MCDONALD, J., dissents as to Part II.

MCDONALD, J., concurs in part and dissents in part with an opinion.

BARKETT, J., concurs in part and dissents in part with an opinion, in which KOGAN, J., concurs.

MCDONALD, Justice, concurring in part, dissenting in part.

I would approve the trial judge's order denying relief in full. I have never felt that the alleged claim of a conflict of interest by the assistant public defender, simply because he was an honorary deputy sheriff in an adjoining county, had adequate merit to require an evidentiary hearing on this issue.

BARKETT, Justice, concurring in part, dissenting in part.

I agree that Herring is entitled to a hearing on the conflict-of-interest question. However, I would also require, at the very least, a new sentencing hearing. I am dubious about the reliability and proportionality of a death sentence under the circumstances presented here and under current law. As the majority notes, Herring was nineteen years old at the time of the crime; he had a low IQ; a learning disability; and an abused childhood. These were all deemed to be mitigating circumstances. On the other hand, we have found that the weightiest aggravating circumstance, that of cold, calculated, and premeditated murder, is no longer valid in this case. With the remaining aggravating circumstances weighed against the significant mitigating factors and the fact that this robbery/murder differs little from many others wherein the death penalty was deemed inappropriate, I would remand for a new sentencing hearing.

KOGAN, J., concurs.

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580 So.2d 135, 16 Fla. L. Weekly 293

APPENDIX M

IN THE
SUPREME COURT OF FLORIDA

Case No.

TED HERRING,

Petitioner,

—v.—

JAMES V. CROSBY, JR., Secretary, Department of Corrections, State of Florida, BRADLEY D. CARTER, Warden, Union Correctional Institution, CHARLES CRIST, Attorney General, State of Florida.

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner TED HERRING, through his undersigned counsel, pursuant to Florida Rules of Appellate Procedure 9.030(a)(3) and 9.100, petitions this Court to issue a writ of habeas corpus. In light of the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), Herring's death sentence is in violation of his rights under the United States Constitution and under the Constitution and laws of the State of Florida. Herring respectfully requests oral argument in support of his petition.

In support of his petition, in accordance with Florida Rule of Appellate Procedure 9.100(e), Herring states as follows:

I.

JURISDICTION

This is an original action under Florida Rule of Appellate Procedure 9.100(a). This Court has jurisdiction pursuant to Rule 9.030(a)(3) thereof and Article V, Section 3(b)(9) of the Florida Constitution.

II.

STATEMENT OF FACTS

On May 29, 1981, a convenience store clerk in Daytona Beach, Florida was shot and killed during a robbery at the store. On June 12, 1981, Herring was arrested while in possession of a stolen car. Herring was taken to the police station and interrogated, at which time he confessed to the killing of the store clerk during the May 29, 1981 robbery. *Herring v. State*, 446 So. 2d 1049, 1051-52 (Fla. 1984) ("*Herring I*").

In February 1982, Herring was tried for armed robbery and murder in the first degree arising out of the May 29, 1981 incident in the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, Florida (the "trial court"). On February 25, 1982, the jury returned a verdict of guilty on both counts. The sentencing phase of Herring's trial was held on February 26, 1982, immediately following the conclusion of the guilt phase. The jury returned an advisory recommendation of death by an eight-

to-four vote. The trial judge found that four aggravating and two mitigating circumstances applied and sentenced Herring to death. *Id.* at 1052-53.

The aggravating circumstances that the trial judge found explicitly were: (1) Herring previously had been convicted of an unrelated robbery with a firearm; (2) the murder was committed while Herring was engaged in the commission of a robbery; (3) the murder was committed for the purpose of avoiding or preventing a lawful arrest; and (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The mitigating circumstances the trial judge found were that: (1) Herring had a difficult childhood and had learning disabilities; and (2) Herring was nineteen years old at the time of the crime. *Id.* at 1053; (*see also* Petitioner's Appendix, filed concurrently herewith ("Pet. App.") Ex 1.)

During post-conviction proceedings pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, however, the trial judge explained the true—and entirely improper—reason he sentenced Herring to death:

> The Defendant not only initially gave conflicting stories to police but perhaps most damaging of all he told the jury the preposterous story of how a second robber "beat him to the punch" [the trial judge's words, not Herring's]; robbed and shot the clerk. *Frankly, this preposterous story doomed the Defendant not only as to a conviction but as to sentence as well.*

State v. Herring, No. 81-1957-CC, slip. op. at 5-6 (Fla. Cir. Ct. July 24, 1985) (emphasis added); (*see also* Pet. App. Ex 2 at 5-6.) The trial judge's written findings with respect

to sentencing did not disclose that he relied on a "perjury aggravator" in sentencing Herring to death. (Pet. App. Ex. 1.)[1]

III.

NATURE OF RELIEF SOUGHT

Herring seeks an order of this Court vacating his death sentence.

IV.

POST-CONVICTION PROCEDURAL HISTORY

Herring appealed from his judgment and sentence to this Court, which affirmed his judgment and sentence on February 2, 1984 and denied rehearing on April 11, 1984. *Herring I*, 446 So. 2d at 1049.

On March 5, 1982, Herring filed a motion for a new trial and a motion for a new penalty phase pursuant to Rules 3.580, 3.590 and 3.600 of the Florida Rules of Criminal Procedure in the trial court. As grounds therefor, Herring claimed that: (a) the verdict was contrary to law; (b) the verdict was contrary to the weight of the evidence; (c) the trial court erred in excusing for cause a prospective juror because of his views on capital punishment; (d) the trial court erred in allowing into evidence a taped statement made by Herring over Herring's objection; (e) the trial

[1] To the greatest extent permissible under the law and the Court's rules, Herring incorporates by reference in this Petition the entire contents of his record on appeal, all supplements thereto, and any and all other appendices, appeals, petitions, and documents previously transferred to or filed with this Court.

court erred during the penalty phase in refusing to allow Herring to introduce into evidence testimony regarding other first degree murder cases handled in Volusia County; and (f) the trial court erred during the penalty phase in not allowing defense counsel to read during his final argument to the jury poems Herring composed. On March 11, 1989, the trial court denied both motions. No evidentiary hearing was held.

On April 1, 1985, Herring filed a motion to vacate the judgment and sentence against him pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure in the trial court. As grounds therefor, Herring claimed that: (a) the "heightened premeditation" aggravating circumstance was erroneously and unconstitutionally applied; (b) the "avoidance of arrest" aggravating circumstance was erroneously and unconstitutionally applied; (c) both the "cold, calculated and premeditated" and the "avoidance of arrest" aggravating circumstances were applied on the basis of the same aspect of the crime and thus were improperly doubled; (d) the admission of a probation officer's testimony was erroneous and unconstitutional; (e) Herring's appointed counsel at sentencing rendered ineffective assistance of counsel; (f) the jury instructions regarding sentencing were constitutionally inadequate; (g) the trial judge failed to consider the proportionality of the death sentence in this case as compared with other cases in which the death penalty had been imposed; (h) the trial judge unconstitutionally surrendered to the jury his obligation to act as final arbiter in imposing the sentence; (i) Herring was sentenced pursuant to an arbitrary and racially discriminatory capital sentencing scheme; (j) the prosecutor improperly suggested that Herring might be granted parole if given life imprisonment during her closing argument; (k) the exclusion for cause of

a prospective juror because of his views on capital punishment violated Herring's constitutional rights; (l) Herring's trial jury did not constitute a representative cross-section of the community because of the exclusion of persons with conscientious or religious scruples against the death penalty; (m) Herring's trial jury was biased in favor of the state on issues of guilt or innocence; and (n) Herring's confession was improperly admitted into evidence. On July 24, 1985, the trial court denied the motion. No evidentiary hearing was held. Herring appealed to this Court, which affirmed the trial court's decision on December 30, 1986, and denied rehearing on March 2, 1987. *Herring v. State*, 501 So. 2d 1279 (Fla. 1986) ("*Herring II*").

On March 9, 1987, Herring filed a petition for a writ of habeas corpus pursuant to Rule 9.030(a)(3) of the Florida Rules of Appellate Procedure in this Court. As grounds therefor, Herring claimed his appellate counsel rendered ineffective assistance of counsel for failing to raise the following claims: (a) the admission of the probation officer's testimony was constitutional error and impermissible under Florida law; (b) Herring's confession was constitutionally inadmissible; (c) the trial court impermissibly applied two aggravating circumstances on the basis of the same aspect of the shooting; (d) the jury instructions regarding the imposition of the death penalty were constitutionally inadequate; and (e) the prosecutor, in her closing argument, improperly argued that Herring was young enough to be out on the streets "to kill and rob again" if given life imprisonment. On June 23, 1988, this Court denied relief on the petition and denied rehearing on August 25, 1988. *See Herring v. Dugger*, 528 So. 2d 1176 (Fla. 1988) ("*Herring III*").

On March 9, 1989, Herring filed a successive motion to vacate his sentence in the trial court pursuant to Florida Rule of Criminal Procedure 3.850. As grounds therefor, Herring claimed that his death sentence was illegal under *Rogers v. State*, 511 So. 2d 526, 533 (Fla. 1987), because *Rogers* requires that the heightened premeditation aggravating circumstance include proof beyond a reasonable doubt of calculation, which consists of a careful plan or prearranged design to kill. On May 25, 1989, the trial court denied relief under *Rogers* but granted Herring leave to amend his 3.850 motion to claim that Herring's trial counsel harbored a conflict of interest in violation of the Sixth and Fourteenth Amendments of the United States Constitution.

On November 5, 1989, the trial court summarily denied the amended motion without granting leave to take depositions and without conducting an evidentiary hearing. On March 8, 1990, Herring appealed to this Court, and, on May 2, 1991, the Court held that the heightened-premeditation aggravating factor should not have been applied to Herring at sentencing. Nevertheless, the Court declined to grant a new sentencing hearing. The Court did, however, remand the case for an evidentiary hearing with respect to Herring's trial counsel's conflict of interest. *See Herring v. State*, 580 So. 2d 135, 138 (Fla. 1991) ("*Herring IV*").

On remand, and after a hearing held on December 15-18, 1992, the trial court again denied Herring's motion pursuant to an April 2, 1993 decision. On April 21, 1993, Herring again appealed to this Court, and, on March 7, 1996, the Court vacated the trial court's ruling on the ground that the 3.850 evidentiary hearing was procedurally flawed. *See Teffeteller v. Dugger* (*Herring v. State*), 676

So. 2d 369 (Fla. 1996) ("*Herring V*"). A new hearing was then conducted in the trial court on November 25-27, 1996, and Herring's motion was again denied. Herring again appealed to this Court, which, on September 24, 1998, affirmed the denial of the 3.850 motion. *See Herring v. State*, 730 So. 2d 1264 (Fla. 1998) ("*Herring VI*").

On October 22, 1999, Herring filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida. As grounds therefor, Herring claimed that: (a) in summarily upholding Herring's sentence despite the elimination of the heightened-premeditation aggravating circumstance, this Court's rulings were contrary to *Clemons v. Mississippi* and in violation of the Eighth and Fourteenth Amendments; (b) the trial court's application of a constitutionally impermissible non-statutory aggravating circumstance in sentencing Herring to death entitles Herring to a new sentencing hearing; (c) this Court erroneously applied the "avoidance of arrest" aggravating circumstance in violation of the Eighth and Fourteenth Amendments; (d) Herring's death sentence resulted from the improper doubling of aggravating circumstances in violation of the Eighth and Fourteenth Amendments; (e) this Court erred in admitting Probation Officer Mary White's testimony because Herring was not given *Miranda* warnings prior to his interview with the officer; (f) the surprise use of Officer White's testimony violated the Fifth, Sixth, Eighth and Fourteenth Amendments; (g) the use of Officer White's testimony improperly injected racial bias into the sentencing proceeding and was motivated by impermissible racial considerations; (h) in evaluating Howard Pearl's conflicts of interest under the Sixth and Fourteenth Amendments, the courts unreasonably applied *Cuyler v. Sullivan* to the facts of Herring's case; (i) Her-

ring's court-appointed counsel at the guilt and sentencing phases provided ineffective assistance in violation of Herring's Sixth and Fourteenth Amendment right to counsel; (j) Herring received ineffective assistance of appellate counsel in violation of the Sixth, Eighth and Fourteenth Amendments; (k) the instructions regarding the imposition of the death penalty were constitutionally inadequate; (l) the trial court erroneously excluded evidence properly offered by Herring in mitigation; and (m) the petitioner's rights under the Sixth and Fourteenth Amendments were violated by the exclusion of a prospective juror for cause, because of his views on the death penalty.

On April 14, 2003, the federal district court denied Herring's petition. On May 14, 2003, Herring filed a notice of appeal and an application for a certificate of appealability so his appeal from the denial of his federal habeas corpus petition may be heard by the United States Court of Appeals for the Eleventh Circuit. On June 19, 2003, the District Court denied the application for a certificate of appealability.

On June 20, 2003, Herring filed a motion in the trial court to vacate his death sentence pursuant to sections 3.850 and 3.851 of the Florida Code of Criminal Procedure. Specifically, Herring argues that his death sentence violates the Eighth and Fourteenth Amendments of the United States Constitution as interpreted in *Atkins v. Virginia*, 536 U.S. 304 (2002). The motion establishes clearly—through the report of a leading neuropsychologist, IQ testing, and school and medical records—that Herring is a person with mental retardation and that, therefore, he is ineligible for the death penalty. The motion is pending response by the State of Florida.

V.

HERRING'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER *RING V. ARIZONA*

A. Ring invalidated Florida's capital sentencing scheme

In *Ring v. Arizona*, 536 U.S. 584 (2002), the United States Supreme Court held that the "Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury." *Id.* at 597. Specifically, the Court held that Arizona's death sentencing statute was unconstitutional because it assigned the fact finding necessary to put the defendant to death to the judge and not the jury. *Id.* at 609.

Florida's death sentencing statute—under which Herring was sentenced—suffers from precisely the same constitutional flaw. Like the Arizona statute addressed in *Ring*, Florida's statute provides specifically that the judge, and not the jury, makes the factual findings necessary to put a defendant to death.

The statute itself provides explicitly that the trial judge—and not the jury—must make the necessary factual findings for a death sentence. Fla. Stat. § 921.141. Moreover, the United States Supreme Court has held repeatedly that under the Florida capital sentencing scheme, the trial judge alone makes the findings of fact necessary to impose death. *See, e.g., Hildwin v. Florida*, 490 U.S. 638 (1989).

Indeed, in *Walton v. Arizona*, the Supreme Court held that for Sixth Amendment purposes the Florida statute is *indistinguishable* from the very statute the Supreme Court later struck down in *Ring*:

> The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does *not* make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. *A Florida trial court no more has the assistance of jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.*

497 U.S. 639, 648 (1990) (emphasis added). Accordingly, when the Supreme Court struck down the Arizona statute, it implicitly invalidated the Florida sentencing scheme as well.

This conclusion is confirmed by this Court's ruling in *Mills v. Moore*, 786 So. 2d 532 (Fla. 2001). In *Mills*, this Court noted that in *Walton*, the Supreme Court "addressed a capital sentencing scheme and held that the presence of an aggravating circumstance in a capital case may constitutionally be determined by a judge rather than a jury. Because *Apprendi* did not overrule *Walton*, the basic scheme in Florida is not overruled either." *Id.* at 536-37. But in *Ring*, the Supreme Court *did* hold that the Sixth Amendment right recognized in *Apprendi* extends to capital sentencing and overruled *Walton*. Thus, as this Court recognized in *Mills*, if *Walton* is unconstitutional, so too is the Florida capital sentencing scheme.

In addition to *Mills*, the Florida courts have held repeatedly that a Florida jury's participation in capital sentencing is only advisory and that the trial judge alone makes the findings of fact necessary to impose death. *See, e.g., Pope v. Wainwright*, 496 So. 2d 798, 805 (Fla. 1986) (the jury

does not "bear[ ] the same degree of responsibility as that brought on a by a 'true sentencing jury'"); *Odom v. State*, 403 So. 2d 936, 942 (Fla. 1981) (jury's role restricted to announcing "the judgment of the community as to whether the death penalty is appropriate"); *Johnson v. State*, 393 So. 2d 1069, 1074 (Fla. 1980) ("[t]he function of the jury in the sentencing phase [*i.e.*, recommending] . . . is not the same as the function of the jury in the guilt phase [*i.e.*, fact finding]"); *accord Van Royal v. State*, 497 So. 2d 625, 628 (Fla. 1986); *Engle v. State*, 438 So. 2d 803, 813 (Fla. 1983); *Davis v. State*, 703 So. 2d 1055, 1061 (Fla. 1997); *Grossman v. State*, 525 So. 2d 833, 840 (Fla. 1988); *Morton v. State*, 789 So. 2d 324, 333 (Fla. 2001). Or, as Justice Shaw put it in *Combs v. State*, "the jury's recommendation is merely advisory [and] *not supported by findings of fact*." 525 So. 2d 853, 859 (Fla.1988) (Shaw, J., concurring) (emphasis added).

Finally, post-*Ring*, the Florida capital sentencing scheme can no longer coexist with the United States Supreme Court's ruling in *Caldwell v. Mississipi*, where the Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. 320, 328-29 (1985). Herring's jurors were not only "led to believe" that the responsibility for determining his death rested elsewhere, they were *formally instructed* that "the final decision as to what punishment shall be imposed, is the *responsibility of the Judge*." (App. Ex C. at 815-16) (emphasis added). Thus, the Florida statute, as applied to Herring, could not have satisfied *both* the requirements of *Ring* and the requirements of *Caldwell* at once.

This Court first addressed the constitutionality of Florida's capital sentencing scheme in the wake of *Ring* in *Bottoson v. Moore*, 833 So. 2d 693 (Fla.) (*per curiam*), *cert. denied*, 123 S. Ct. 622 (2002). There, the Court held that it is for the United States Supreme Court to instruct Florida that its capital sentencing scheme violates *Ring* and that, in the absence of such an instruction, the Court would not vacate Bottoson's sentence. *Id.*

Notwithstanding the Court's *per curiam* ruling in *Bottoson*, the concurring opinions of individual justices expressed grave doubt that the Florida scheme can be reconciled with *Ring*. Chief Justice Anstead expressed "concerns that Florida's scheme may not comply with the Sixth Amendment as now construed in *Ring*" because in Florida the trial judge alone determines the existence of aggravators and thus makes the findings necessary for the death penalty to be imposed. *Id.* at 704-05. Similarly, Justice Pariente wrote that "*Ring* does raise serious concerns as to potential constitutional infirmities in our present capital sentencing scheme" because, among other things, "[t]he jury does not *find* specific aggravating factors. Thus, it is the jury that recommends a sentence and the judge who *finds* the specific aggravators." *Id.* at 719. In addition, Justice Shaw concluded that *Ring* "has a direct impact on Florida's capital sentencing statute" because Florida law requires a unanimous jury finding for any element of criminal offense, and "[n]owhere in Florida [capital sentencing] law is there a requirement that the finding of an aggravating circumstance must be unanimous." *Id.* at 717.

To date, neither the United States Supreme Court nor any other federal court has issued a decision answering the question of whether Florida's capital sentencing scheme

survived *Ring*. This Court thus far has adhered to its *per curiam* decision in *Bottoson*—but not without dissent. *See, e.g.*, *Butler v. State*, 842 So. 2d 817, 840 (Fla. 2003) (Pariente, J., dissenting in pertinent part); *see also id.* at 835 (Anstead, C.J., dissenting in pertinent part); *id.* at 834 (Shaw, J., dissenting in pertinent part).

Herring respectfully submits that it is error for this Court to uphold Florida death sentences post-*Ring* while awaiting definitive guidance from the United States Supreme Court. State courts routinely apply their judgment and discretion to questions of constitutional law without specific instructions from the federal courts. The Court need not and should not refrain from doing so where, as here, a person's life is at stake.

Accordingly, because the trial judge, and not the jury, made the findings of fact necessary to impose death, Herring's sentence should be vacated pursuant to *Ring*.

B. Even if Florida's capital sentencing scheme remains constitutional, Herring's death sentence still cannot be reconciled with *Ring*

As will be shown below, even if the Court adheres to its decision in *Bottoson*, there are ample grounds to vacate Herring's sentence based on the specific circumstances of this case.

1. The 8-4 split in Herring's jury renders his sentence unconstitutional under *Ring*

To the extent the Florida capital sentencing scheme survives *Ring*, it is because the jury plays a role. *See Bottoson*, 833 So. 2d at 701 (Quince, J. concurring) ("the basic premise of *Ring* has been fulfilled under the Florida

statute. That is, the trial judge does not make the sentencing decision alone.") Indeed, there is no other basis to differentiate the Florida statute from the Arizona statute struck down in *Ring*.

If it is jury participation that saves the Florida scheme, then such participation must conform to the requirements of the Florida Constitution and the United States Constitution as interpreted in *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). As Justice Pariente explained in the recent *Butler* case, "*Ring*, considered in tandem with the jury-trial guarantee [requiring unanimity] in article I, section 22 of the Florida Constitution" requires the reversal of a death sentence where the jury's advisory sentence is non-unanimous. *Butler*, 842 So. 2d at 836.

Prior to *Apprendi* and *Ring*, the absence of unanimity did not appear to be a problem because the United States Supreme Court had not yet recognized a "Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *Hildwin*, 490 U.S. at 640 (citations omitted) (pre-*Ring* decision upholding Florida capital sentencing scheme). When the Supreme Court overruled that principle in *Apprendi*, and later *Ring*, jury unanimity became a *sine qua non* for valid capital sentencing. *See Bottoson*, 833 So. 2d at 710 (Anstead, C.J., concurring) ("However, in Florida, the jury's advisory recommendation in a capital case is not statutorily required to be by unanimous vote . . . . This would appear to constitute another visible constitutional flaw in Florida's scheme when the Sixth Amendment right to a jury trial is applied as it was in *Apprendi* and *Ring*.")

A full third of Herring's jury voted against death. The recommendation of so deeply divided a panel simply cannot serve as the basis for a death sentence in light of *Ring*. As Justice Scalia explained, "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 610. Thus, under *Ring*, the predicates for death must be found by the jury, and, under Florida law, the jury must be unanimous. Fla. Const. Art. I, § 22; *accord Jones v. State*, 92 So. 2d 261 (Fla. 1956); *see also Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) (key principal of American criminal justice system is that defendant's guilt will be "determined beyond a reasonable doubt by the *unanimous* vote of 12 of his fellow citizens")

Because Herring's panel was divided eight to four, his death sentence violated his right under the Florida and United States constitutions to unanimous jury findings beyond a reasonable doubt on all factors necessary to sentence him to death.

2. The trial judge's reliance on an uncharged statutory aggravator violated Herring's rights under *Ring*

Ring requires that the jury make all of the factual findings necessary to impose death. Even assuming, *arguendo*, that the Florida capital sentencing scheme meets this requirement, a death sentence obviously cannot be based on findings that the jury *did not make*. Here, the trial judge has admitted that the basis of *his* decision to impose death was not the recommendation of the jury but rather *his* con-

clusion that Herring committed perjury. (Pet. App. Ex. B at 5-6.) None of the trial court's instructions to the jury advised them that perjury was an appropriate consideration in determining either guilt or the appropriate sentence because it obviously was an improper consideration. (Pet. App. Ex. C at 815-21.)

Thus, even if in its formulation the Florida scheme provides for the judge and jury to decide death "together," there is conclusive factual evidence that here trial judge decided death alone. The jury was not told that perjury was a relevant consideration, and assuming, as one must, that the jury adhered faithfully to the court's instructions, *there was no jury consideration of Herring's perjury*. Accordingly, Herring was deprived of his right under the Sixth and Fourteenth Amendments of the United States Constitution to have a jury determine (or, at a minimum, participate in the determination of) all of the factual predicates to his death sentence.[2]

3. The trial court's constitutionally inadequate jury instructions deprived Herring of his right under *Ring* to have the jury make the factual determinations necessary to his sentence

The failure of a trial judge to properly charge an advisory jury in a death penalty case was a serious error before *Ring*. In light of the newly recognized constitutional requirement that jurors make the predicate findings, how-

2 The trial judge's consideration of perjury also was improper because it treated constitutionally protected conduct (*i.e.*, testifying) as the basis of an aggravating factor, *see Zant v. Stephens*, 462 U.S. 862 (1983), and impermissibly considered a non-statutory aggravating factor. *Kormondy v. State*, 703 So. 2d 454, 463 (Fla. 1997).

ever, such instructions are far more significant now. Here, even assuming the constitutionality of the Florida capital sentencing scheme, the jury did not and could not discharge its obligations because the trial judge provided inadequate instructions at sentencing.

The jury instructions regarding aggravating circumstances were presented with so little guidance that the aggravating circumstances in this case could conceivably have been interpreted to cover *every* first-degree murder. (Pet. App. Ex C at 815-21.) The Supreme Court repeatedly has emphasized that the Constitution requires that a capital sentencing jury's discretion in recommending the imposition of the death penalty be guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty in order to eliminate arbitrariness and capriciousness. *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Zant*, 462 U.S. at 890. "Because the channeling function of an aggravating circumstance requires an objective determination by the sentencer, an aggravating circumstance must be described in 'terms that are commonly understood, interpreted and applied.'" *Newlon v. Armontrout*, 885 F.2d 1328, 1334 (8th Cir. 1989) (quoting *Cartwright v. Maynard*, 822 F.2d 1477, 1485 (10th Cir. 1987), *aff'd*, 486 U.S. 356 (1988)).

Unless aggravating circumstances are sufficiently explained, the "standard may be so vague that it would 'fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* . . . could occur.'" *Id.* at 1334 (quoting *Zant*, 462 U.S. at 877). The instructions given to the jury in Herring's case were contrary to clearly established Supreme Court

precedent. *Maynard*, 486 U.S. at 356. Accordingly, the jury could not have fulfilled its constitutionally mandated finding of all facts necessary for the imposition of death.

In this case, the trial judge's sentencing charge—which was derived from but did not constitute the full set of standard jury instructions in effect in Florida at the time—failed to provide the clear, precise guidance that is constitutionally mandated and failed to give any guidance on the meaning of the aggravators. The instructions began with the following remarks:

> It is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of first degree murder.
>
> As you have been told, the decision as to what punishment shall be imposed, is the responsibility of the Judge. However, it's your duty to follow the law that will now be given to you by the Court and render an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty. And whether sufficient mitigating circumstances exist, outweigh the aggravating circumstance found to exist. Your advisory sentence should be based upon the evidence that you've heard while trying the guilt or innocence of the Defendant and evidence that has been presented to you in these proceedings.

(Pet. App. Ex. C at 815-16.) The trial judge then simply read certain of the aggravating and mitigating circumstances listed in the statute. The entire charge consists of only six pages of transcript. (*Id.* at 815-21.)

The quoted portion of the instructions was deficient in several respects. First, the court failed to define the terms "aggravating circumstance" and "mitigating circumstance" in charging the jury, or to explain their nature or function in the sentencing process. "[I]f 'an aggravating circumstance is defined and applied so broadly that it conceivably could cover every first degree murder, then it obviously cannot fulfill its constitutional responsibilities to eliminate the consideration of impermissible factors and to provide a recognizable and meaningful standard for choosing the few who are to die.'" *Cartwright*, 822 F.2d at 1485 (citation omitted). Here, the trial judge gave no indication that the aggravating circumstances were factors which distinguished this particular capital felony from most other homicides, and that, before an advisory verdict of death could be rendered, the jury had to find the existence of at least one of the statutory aggravating circumstances beyond a reasonable doubt. Because of the critical importance of these terms in the sentencing scheme, it was unfair to use the terms without explanation, or to assume that a jury would immediately comprehend their nature or function in the sentencing process.

The trial judge's instructions also failed to explain the nature of the balancing process, and were thus similar to the instructions struck down by the Eleventh Circuit in *Moore v. Kemp*, 809 F.2d 702, 730-33 (11th Cir. 1987). Although the trial judge indicated that the aggravating and mitigating circumstances had to be "weighed" against one another, he did not clearly explain how the jury was to undertake such an analysis. The jury was never told directly that they could vote for life even if they found that an aggravating circumstance had been proven. Nor was the jury told that they could vote for life even if they did not

find that any of the statutory mitigating circumstances had been proven. Thus, the jury "could easily have gotten the impression that the existence of an aggravating circumstance necessitated a death sentence." *Id.* at 733. Notably, the trial judge also omitted any reference to Florida's well-settled rule that the weighing process is not a mere "mechanical tabulation" of aggravating versus mitigating circumstances. *See Brown v. State*, 381 So. 2d 690, 696 (Fla. 1980); *State v. Dixon*, 283 So. 2d 1, 5 (Fla. 1973). Nor did he explain to the jury how aggravating circumstances could "outweigh" mitigating circumstances, or vice versa.

The trial judge also failed to give any common sense examples of each aggravating circumstance, and he did not provide any explanation or guidance as to the meaning of the particular aggravating circumstances. The judge made no reference to the salient points of law developed by the Florida courts in construing these circumstances. Specifically, the trial judge did not explain to the jury that the avoidance of arrest aggravating circumstance requires a demonstration that avoidance of arrest was the dominant or sole motive for the capital felony. The judge also did not explain that the "cold, calculated and premeditated" aggravating circumstance requires a showing of heightened premeditation beyond that required for a first-degree murder conviction. The meaning of these circumstances is not readily apparent to the layman without some further explanation, and the jury was given no guidance as to their meaning. They were thus left to interpret these circumstances in ways inconsistent with constitutional requirements.

As a result, the court deprived Herring of a valid determination by the jury of all elements necessary for his conviction as required by *Ring*.[3]

4. Herring's sentence must be vacated because the trial court charged the jury with an improper aggravator

In response to Herring's second 3.850 motion, the Florida Supreme Court struck down the cold, calculated and premeditated aggravating factor, holding that it "no longer applies to the circumstances in *Herring*." *Herring IV*, 580 So. 2d 135, 138 (Fla. 1991). Nevertheless, at that time, this Court declined to vacate Herring's sentence. *Id.* The *Ring* decision, however, casts the issue in an entirely new light.

In *Clemons v. Mississippi*, 494 U.S. 738 (1990), the United States Supreme Court held that an appellate court can cure error resulting from improper application of an aggravating circumstance by either reweighing the sentence or by conducting a harmless error analysis. *Id.* Even assuming that this Court properly conducted the *Clemons* review, it is clear after *Ring* that the review violated Herring's constitutional rights under the Sixth and Fourteenth Amendments. In *Clemons*, the Supreme Court stated:

> Nothing in the Sixth Amendment as construed by our prior decisions indicates that a defendant's right to a jury trial would be infringed where an appellate court invalidates one of two or more aggravating circumstances found by the jury, but affirms the death sentence after itself finding that the one or more valid

[3] Moreover, as Justice Shaw noted in *Bottoson*, in light of *Ring*, Florida's sentencing instructions in capital cases may "no longer be valid" in any event. 833 So. 2d at 730 (Shaw, J., concurring).

> remaining aggravating factors outweigh the mitigating evidence. Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.

494 U.S. at 745. But *Ring* held that capital defendants are "entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring*, 536 U.S. at 589 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 482-83 (2000)). The rationale permitting this Court to reweigh the aggravating and mitigating circumstances thus no longer exists.

This Court struck down one of the aggravating factors considered by the jury. Even if the Court's reweighing or harmless error analysis previously was sufficient under *Clemons*, *Ring* invalidated the analysis as there is no telling how this factor implicated the jury's recommendation of death. Unlike "automatic aggravator" states where the presence of a single aggravator is the only fact required to support a death sentence, in Florida there must be a separate factual finding that the aggravators are "sufficient," and yet another factual finding that these aggravators "outweigh" the mitigating circumstances. Fla. Stat. § 921.141. Accordingly, where, as here, an aggravator that the jury relied on has been stricken, it violates *Ring* for this Court to substitute its judgment for that of the jury in deciding whether the remaining aggravators were sufficient to warrant a recommendation of death. *Cf. Stromberg v. California*, 283 U.S. 359, 367-68 (1931) ("The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set

forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause.")[4]

When this Court decided the *Clemons* issue in *Herring IV*, it admittedly was not clear that the Court was intruding upon a function constitutionally reserved for the jury. After *Ring*, however, it is perfectly clear that this Court's striking of the cold, calculated and premeditated aggravator required that Herring's sentence be vacated.[5]

5. Herring's felony convictions do not preclude a *Ring* claim

As noted previously, among the aggravators found in this case were prior and contemporaneous felony convictions. In its post-*Bottoson* opinions, this Court has suggested that the presence of such convictions may preclude

[4] In *Duckett v. Mullin*, 306 F.3d 982, 1002 n.11 (11th Cir. 2002), the court noted that there is a question as to "whether the Court's holding in *Clemons* will survive in light of the recent decision in *Ring v. Arizona* . . . .")

[5] Indeed, this Court's jurisprudence strongly suggests that cold, calculated and premeditated aggravator is given comparatively great weight by judges and advisory juries alike. *See, e.g., Bowles v. State*, 804 So. 2d 1173, 1176 (Fla. 2001) (trial court assigned "great weight" to cold, calculated and premeditated aggravator). Accordingly, allowing Herring's sentence to stand where the jury more likely than not gave great weight to this stricken factor would be particularly inconsistent with *Herring*'s rights under *Ring*.

relief under *Ring*. *See, e.g.*, *Banks v. State*, 842 So. 2d 788, 793 (Fla. 2003).

The rationale for these opinions appears to be the so-called "prior conviction exception" originating from *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In substance, this Court's rationale for rejecting *Ring* claims by petitioners with prior or contemporaneous felony convictions appears to be that, because a jury has found the commission of such a felony unanimously and beyond a reasonable doubt during the guilt phase, the jury has also, by definition, found an aggravator sufficient to impose death. For the reasons set forth below, this reasoning does not satisfy *Ring*.

First, applying a prior or contemporaneous felony exception ignores *Ring*'s requirement that the jury make *every* factual finding necessary to impose death. *Ring*, 536 U.S. at 597. Unlike states where the finding of a single aggravator renders a defendant death-eligible, the Florida statute makes clear that a series of independent factual findings are necessary to impose death. Specifically, the Florida statute requires a factual finding of (a) "sufficient aggravating circumstances;" and (b) "insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. § 921.141. In other words, the fact-finder's role does not end when it determines that an aggravator exists. It must also make a factual determination as to whether the aggravators are "sufficient." If the aggravators are sufficient, the fact-finder then must make factual findings as to any applicable mitigating circumstances. Once that is done, the fact-finder must make a determination as

to whether the mitigating circumstances are sufficient to outweigh the aggravating circumstances.[6]

Accordingly, the fact that the jury has made the predicate factual finding for a violent felony aggravator does not strip the defendant of his right to have the jury determine whether the aggravator is "sufficient," nor does it deprive the defendant of his right to have the jury determine (i) whether mitigating circumstances are present; and (ii) if so, whether those circumstances are sufficient to outweigh the aggravators. Here, there is no dispute that the Court, and not the jury, made the factual finding that Herring's aggravators were "sufficient" and made all of the factual findings with respect to mitigating circumstances. As such, Herring's conviction violates *Ring* regardless of whether the jury found prior and contemporaneous violent felonies. Nothing in *Ring* or *Apprendi* is to the contrary.

This interpretation is consistent with Nevada's interpretation of its own, similar death penalty statute. As the Nevada Supreme Court explained:

> Nevada statutory law requires two distinct findings to render a defendant death—eligible: "The jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance *and further finds* that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found." NRS 175.554(3). This second finding regarding mitigating circumstances is necessary to authorize the death penalty in

[6] In appropriate cases, this Court has held that a felony aggravator standing alone may be insufficient for the imposition of death. *Cf. Chaky v. State*, 651 So. 2d 1169, 1173 (Fla. 1995); *Jorgenson v. State*, 714 So. 2d 423, 428 (Fla. 1998).

> Nevada, and we conclude that it is in part a factual determination, not merely discretionary weighing.

Johnson v. State, 59 P.3d 450, 460 (Nev. 2002).

Similarly, on remand after the Supreme Court's decision in *Ring*, the Arizona Supreme Court clarified that "Arizona's statutes require *more than* the presence of one or more statutorily defined aggravating factors . . . [and] the *trier of fact* must determined whether mitigating circumstances call for leniency." *State v. Ring*, 65 P.3d 915, 915-16 (Ariz. 2003) (emphasis added). A system whereby the jury determines the aggravator (i.e., a prior felony), and the judge makes factual findings as to mitigating circumstances, cannot satisfy *Ring*. All such facts must be determined by the jury. Thus, the presence of a prior or contemporaneous felony simply cannot shield a death sentence from *Ring* scrutiny.

Second, the Supreme Court's decision in *Almendarez-Torres*, which is the root source of the so-called violent felony exception to the Sixth Amendment, is neither good law nor applicable here. *Almendarez-Torres* "stands for the proposition that not every fact expanding a penalty range must be stated in a felony indictment, the precise holding being that recidivism increasing the maximum penalty need not be not so charged." *Jones v. United States*, 526 U.S. 227, 248 (1999).

Almendarez-Torres rests on the now discredited proposition that a legislature may determine whether a particular requirement for sentencing constitutes a mere sentencing factor or an element of the crime. *Almendarez-Torres*, 523 U.S. at 228. *Ring* eviscerated this notion by making clear that these labels do not matter. *Ring*, 536 U.S. at 605

(aggravating circumstance necessary for imposition of a death sentence operates as the "functional equivalent" of an element of a greater offense and must be found by the jury.) (emphasis added); *id.* at 610 (Scalia, J., concurring) ("whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—[they] must be found by the jury beyond a reasonable doubt").

Moreover, even before *Ring*, the Supreme Court's decisions in *Jones* and *Apprendi* had all but buried *Almendarez-Torres*. In *Apprendi*, the majority noted that "it is arguable that *Almendarez-Torres* was incorrectly decided" but because the defendant in *Apprendi* did not contest the application of the exception, the Court did not need to "revisit" *Almendarez-Torres* at that time. *Apprendi*, 530 U.S. at 489. In *Jones*, which pre-dated the Court's decision in *Apprendi*, the Court noted that *Almendarez-Torres* was limited it to its facts, which involved Fifth Amendment indictment-related rights, rather than the Sixth Amendment right to a jury. *Jones*, 526 U.S. at 248 (1999) (*Almendarez-Torres* was limited to the "rights to indictment and notice" and is perhaps not applicable in a case "concerned with the Sixth Amendment right to jury trial.") Accordingly, Herring's felony convictions do not preclude relief under *Ring*.

V.

IN LIGHT OF RING, HERRING'S INDICTMENT IS CONSTITUTIONALLY DEFECTIVE

Herring's death sentence also must be vacated because all elements of the offense necessary to establish the crime of which he was convicted were not charged in the indict-

ment. (Pet. App. Ex D.) In *Jones*, the Supreme Court made clear that once the determination of a fact is elevated to an element of an offense, it *must* be charged in the indictment. 526 U.S. at 232 ("[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt.")

In *Ring*, the Supreme Court held that where a statute's sentencing scheme makes aggravating factors a prerequisite to the imposition of the death penalty those "aggravating factors operate as 'the functional equivalent of an element of a greater offense . . .'" *Ring*, 536 U.S. at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19). Accordingly, since the aggravating factors that elevated Herring's sentence to death were not included in his indictment, Herring's sentence is in violation of his constitutional rights as illuminated by *Ring*.

Shortly after the Court's decision in *Ring*, the Supreme Court vacated the judgment of the United States Court of Appeals for the Eighth Circuit in *United States v. Allen*, 247 F.3d 741 (8th Cir. 2001), *vacated*, 536 U.S. 953 (2002), in light of *Ring*'s holding that aggravating factors that are prerequisites of a death sentence must be treated as elements of the offense. The Eighth Circuit previously had rejected the argument that aggravating factors must be alleged in the indictment because it held that aggravators are not elements of federal capital murder but rather they are "sentencing protections that shield a defendant from automatically receiving the statutorily authorized death sentence." *United States v. Allen*, 247 F.3d at 763. Similarly to the statutes in question in *Allen*, Florida's death

penalty statute makes imposition of the death penalty contingent upon the government proving the existence of aggravating circumstances, that those aggravators are sufficient to warrant the death penalty, and that the mitigating circumstances are insufficient to outweigh the aggravating circumstances. *See* Fla. Stat. § 921.141(3). Accordingly, Herring' sentence must be vacated for the same reasons the sentence in *Allen* was vacated.

The Florida Constitution also provides that, "[n]o person shall be tried for capital crime without presentment or indictment by a grand jury." Fla. Const. art. 1, § 15. Moreover, this Court has held repeatedly that Florida law requires every "element of the offense" to be alleged in the information or indictment. *State v. Dye*, 346 So. 2d 538, 541 (Fla. 1977) ("[a]n information must allege each of the essential elements of a crime to be valid. No essential element should be left to inference."); *State v. Gray*, 435 So. 2d 816, 818 (Fla. 1983) ("[w]here an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state" and is subject to attack on petition for writ of habeas corpus); *Chicone v. State*, 684 So. 2d 736, 744 (Fla. 1996) ("[a]s a general rule, an information must allege each of the essential elements of a crime to be valid."). Accordingly, because *Ring* made the statutory aggravating and mitigating circumstances elements of Herring's offense, the State's failure to include them in the indictment clearly violated Florida law.

Moreover, while the Supreme Court has noted that the Grand Jury clause of the Fifth Amendment has not been held to apply to the states, *Apprendi*, 530 U.S. at 477 n.3, the Sixth and Fourteenth Amendments to the United States Constitution clearly require that "[i]n all criminal prosecu-

tions, the accused shall . . . be informed of the nature and cause of the accusation . . . ." *State v. Gray*, 435 So. 2d at 816.

VI.

RING APPLIES RETROACTIVELY

Ring applies retroactively to Herring. This Court set the criteria by which a change in law should be applied retroactively in *Witt v. State*, 387 So. 2d 922 (Fla. 1980). A change in law, according to *Witt*, applies retroactively in post-conviction capital proceedings when "the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Id.* at 931.

Ring easily satisfies each of these requirements. *First*, it was decided by the United Statpe Supreme Court. *Second*, it is constitutional in nature. *Third*, there can be no question that it constitutes a development of fundamental significance. The right to trial by jury in a capital proceeding is perhaps the most sacrosanct right in our system of justice. As Justice Shaw explained in his concurring opinion in *Bottoson*, Ring "is of 'fundamental significance' for its purpose is to safeguard the basic protections guaranteed by the right to trial by jury." 833 So. 2d at 717. As Justice Shaw also pointed out, prior to *Ring*, this Court repeatedly has applied significant capital sentencing decisions retroactively. *Id.* at 717 n.50 (citing cases).

In addition, in all of the reported cases raising *Ring* claims, this Court addressed the claim on its merits. *Apprendi* and *Ring* (with *Walton* intervening) were decided approximately 20 years after Herring was sentenced.

Absent prescience, there was no reason for him to raise a *Ring* claim earlier.

VII.

CONCLUSION

For all of the foregoing reasons, Petitioner Ted Herring respectfully requests this Court to issue a writ of habeas corpus vacating his sentence.

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Respectfully submitted,

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APPENDIX N

CONSTITUTION OF THE STATE OF FLORIDA

AS REVISED IN 1968 AND SUBSEQUENTLY AMENDED

ARTICLE I

DECLARATION OF RIGHTS

SECTION 22. **Trial by jury.**—The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.

APPENDIX O

IN THE CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO. 81-1957-CC

STATE OF FLORIDA,

—VS.—

TED HERRING,

Defendant.

ORDER

THIS CAUSE coming on to be heard upon Defendant's Motion for 3.850 relief; and the Court having read the Defendant's Motion (pages 1-102, and exhibits), and the response of the State thereto; the Court file; the trial transcript; and the decision of *Herring vs. State*, 446 So.2d 1049 (FL. 1984); and the Court being otherwise fully advised in the premises finds as follows:

1. The Defendant was found guilty by a jury of first degree murder and robbery with a firearm. By a vote of eight (8) to four (4) the jury recommended the Defendant be sentenced to death. On March 1, 1982 this Court did

sentence the Defendant to death for the murder, and imposed a 99 year sentence for the robbery.

2. The Florida Supreme Court affirmed the conviction and sentence (*Herring vs. State*, 446 So.2d 1049 (FL. 1984)). Certiorari was denied by the United States Supreme Court (*Herring vs. State of Florida*, 1055 S.Ct. 396, 83 L.Ed. 330 (1984).

3. The Florida Supreme Court decision at 446 So.2d 1049 dealt with the following issues:

A. Whether the trial court erred in excusing a death-scrupled juror.

B. Whether the trial court should have allowed defense counsel for other first degree murder defendants to testify that their client received life sentences for similar crimes.

C. Whether the trial court correctly excluded defense counsel from reading poems of the Defendant contained in a clinical report.

D. Whether the trial court improperly found as an aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest.

E. Whether the trial court improperly found the aggravating circumstance that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

F. Whether the death sentence is appropriate in light of other decisions.

4. This Court does agree with the State of Florida that many of the matters complained of in Defendant's motion were or could have been raised on direct appeal. This

Court will not consider these matters as a basis for 3.850 relief. Specifically, the following matters were or could have been raised on direct appeal:

A. The applicability of the cold and calculating aggravating factor.

B. The applicability of the avoiding arrest aggravating factor.

C. That the heightened premeditation and the avoidance of arrest aggravating circumstances were applied on the basis of the same aspect of the shooting, and were thus improperly doubled.

D. The admission of the probation officer's testimony was constitutional error.

E. The jury instructions regarding the imposition of the death penalty were constitutionally inadequate.

F. The trial judge failed to consider the proportionality of the death sentence with sentences imposed in other cases.

G. The trial judge unconstitutionally surrendered to the jury his obligation to act as final arbiter in imposing the sentence.

H. The Defendant was sentenced by an arbitrary and racially discriminating capital sentence scheme.

I. The prosecutor improperly suggested that petitioner might be granted parole if given a life sentence.

J. The exclusion of the death-scrupled jurors.

K. That Defendant's confession was improperly admitted into evidence.

5. The real nub of Defendant's motion is the claim of ineffective trial counsel. Despite the standards set forth in *Knight* and *Strickland* it is very difficult to go back and determine whether trial counsel's actions or inactions amounted to ineffective assistance of counsel. The Court will attempt to deal with the allegations of ineffectiveness and analyze them in light of *Knight* and *Strickland.*

A. In Paragraph "85" of the 3.850 the Defendant alleges there were reports (see Defendant's exhibits "3" and "4") that the Defendant had serious mental and emotional problems. The Defendant now complains these reports should have been introduced. First it should be noted that at least one of the reports was a result of an interview done when the Defendant was 13 years old. Secondly, the defense did establish learning disabilities and psychological problems through the testimony of the Defendant's mother. Thirdly, one of the reports indicates the mother, who was a defense witness and represented to be a concerned mother, was not keeping the child's appointments with the counselor. Lastly, the reports indicate the Defendant was of dull normal intelligence. Taking this all into consideration this Court does not find the failure to introduce these reports was a professional deficiency.

B. In Paragraph "86" of the 3.850 the defense claims trial counsel failed to adequately present other readily available mitigation evidence. This is perhaps the most difficult assertation to analyze. Here more than any other area there is tendency to second guess. In every case that is lost counsel may go back, with the advantage of hindsight, and say this or that should or could have been done.

The defense had the Defendant's mother testify during the sentencing phase. She did establish the Defendant's home life was not good; his parents were separated; he was hyperactive with a low IQ and a learning disability; he had psychological problems; that his mother loved Ted. The psychological reports would have been cumulative to the mother's testimony. It also most be stressed that the trial court did list and consider these matters as mitigating factors.

As to the information set forth in exhibits "7" and "8" the Court questions the importance of the information from the Defendant's former teachers. Obviously much time had passed since they had contact with the Defendant. Their testimony was of doubtful value.

Perhaps the defense should have had the Defendant's other relatives testify on his behalf. While to a large degree it may have been cumulative to that of the mother, perhaps it may in someway have helped the Defendant. But this Court cannot conclude that trial counsel was deficient in presenting the mother alone. It must be remembered that the area of who trial counsel selects to testify if frought with peril. Even the mother, who was an effective defense witness, did admit her son was involved in drug related problems in New York. So trial counsel is caught in a dilemma. He must try to put on mitigating evidence yet not let the State have an opportunity to further damage the Defendant either by cross or rebuttal. This is especially true where the Defendant was charged with several other armed robberies and apparently was having drug related problems in New York City. All in all the Court finds trial counsel was not deficient in only presenting the mother's testimony. This is a matter of trial strategy and should not be second guessed.

C. The defense now contends that trial counsel should have challenged the State's argument that the murder was cold, calculated and premeditated. Yet the Defendant denied he was the one who shot Dale Hoeltzel. He claimed another person murdered the clerk. In any case, the Florida Supreme Court did ultimately determine the murder to be cold, calculating and premeditated.

D. As to the testimony of the probation officer, Mary White, defense counsel did object to statements allegedly made by the Defendant to White. The defense now claims he did not object for the right reasons nor cite proper case law. This contention may be correct in light of *Sireci vs. State*, 399 So.2d 964. Yet counsel did object to and oppose the testimony. Also the State had yet to concede that the murder was not heinous, atrocious, and cruel. The Court finds this act or omission was not a substantial and serious deficiency measurably below the standard of performance expected of a competent attorney.

E. Paragraph 104 complains that trial counsel did not object to cross by the State as to why the Defendant's mother sent Herring to Florida. Yet the door was opened to this cross because on direct the mother testified she sent him to Florida about two years ago. The State had the right and duty to ask why he was sent to Florida. A defense objection to this line of questioning would have been overruled. Again this particular complaint in the 3.850 shows how trial counsel is "damned if he does and damned if he doesn't." Most certainly the 3.850 would complain if the mother were not called to testify; now the 3.850 complains about matters her testimony opened the door to.

F. Paragraph 109 complains about trial counsel's failure to properly introduce Defendant's poems (see 3.850 exhibit "3"). Essentially trial counsel tried to "sneak" in the poems. He was caught and prevented from doing it. Had he introduced the St. Luke's Hospital report containing the poems it would have shown the poems were not original but rather based on popular songs. Also the second page of the report again indicates the mother of the Defendant was not keeping appointments. This would have contradicted her testimony that she did all she could for Ted.

Trial counsel did not correctly try to introduce the poems. But again the Court cannot say this was a serious professional deficiency. Finally, the Court cannot say the Defendant was prejudiced by not having the poems introduced, or if they were introduced the result would be any different.

G. Paragraph 112 complains of trial counsel's failure to properly and successfully argue that testimony should be allowed showing that similar cases resulted in non-death sentences. The Florida Supreme Court specifically held this testimony was not admissible (see *Herring* at Pages 1056 and 1057). Despite what arguments the defense now makes, that type of testimony was not admissible.

H. Paragraph 119 and 120 complain trial counsel told the jury not to consider the age of the Defendant as a mitigating factor. This Court accepts the State's version (see Page 10 of State's response). Mr. Quarles definitely did argue to the jury that age was a mitigating factor, and this Court found it to be so.

6. This court must view trial counsel's alleged errors and omissions in light of the case as a whole. It was a difficult case from the defense standpoint. The Defendant confessed to the crime. Efforts to suppress the confession failed. The Defendant not only initially gave conflicting stories to police but perhaps most damaging of all he told the jury the preposterous story of how a second robber "beat him to the punch"; robbed and shot the clerk. Frankly, this preposterous story doomed the Defendant not only as to a conviction but as to sentence as well. There was little the defense could do to save the Defendant after that.

Additionally, the aggravating factors in this case strongly outweighed the mitigating factors. There were four aggravating and only two mitigating factors. The mitigating factor of age was not strong. The Defendant was at the point where his age was not that much of a consideration. Other non-statutory mitigating factors were in fact established by the defense. They were considered by the jury and the court. These mitigating factors were not particularly significant. This Court finds that even if the non-statutory mitigating factors were bolstered by teacher's statements, comments of relatives, and poems of the Defendant, the result would be no different.

7. The Court concludes that the *Knight/Strickland* tests are not met. The trial defense was not deficient, nor did it prejudice the Defendant. The Defendant received a fair trial and a fair sentence hearing.

8. The Court carefully considered holding an evidentiary hearing on this matter. The Court is aware that normally allegations of ineffective assistance of counsel, especially in capital cases, require a hearing. However, after careful-

ly reviewing the record, the court file, the 3.850 motion, and the State's response, all matters necessary for this court or any other reviewing court to fairly rule on the defense allegations are set forth in the existing records. There is no need for further hearings or evidence. The Court also finds the above records conclusively demonstrate the Defendant is not entitled to relief, and the motion may be denied without an evidentiary hearing.

WHEREFORE, it is ORDERED that Defendant's Motion for 3.850 relief is denied.

DONE AND ORDERED this 24 day of July, 1985, at Daytona Beach, Volusia County, Florida.

Defendant has 15 days from the date hereof to file his Motion for Rehearing, and 30 days to file his Notice of Appeal.

/s/ S. JAMES FOXMAN
S. JAMES FOXMAN CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Order have been mailed and/or delivered to the following persons this 25 day of July, 1985:

Lewis R. Stark, Assistant State Attorney, Courthouse Annex, 125 East Orange Avenue, Daytona Beach, FL 32014;

Jeremy G. Epstein, Attorney for Defendant, Shearman and Sterling, 53 Wall Street, New York, NY 10005.

/s/ VICKY L. MYERS
JUDICIAL ASSISTANT